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In the Supreme Court of the United States

October Term, 1949 - - - Numbers 761-762

JOHN W. EMMERLING, Trustee of Franklin Building Company,

Petitioner,

vs.

ROBERT W. SCHROEDER,

Respondent.

JOHN W. EMMERLING, Trustee of Franklin Building Company,

Petitioner,

vs.

MOLLIE SCHROEDER and JUNE KUPTZ

Respondents.

Brief of Respondents in Opposition to Petition for Certiorari.

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THE OPINIONS IN THE COURTS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported in 178 F. (2d) 805, and appears in the present Record at pages 203 and 209. The opinion of the

District Court for the Eastern District of Wisconsin is reported in 83 F. Supp. 263 and appears in the present Record at pages 173 to 180.

JURISDICTION.

Jurisdiction of this Court is invoked by the petitioner under 28 U. S. Code 1254.

STATEMENT OF THE CASE.

The petitioner's statement of the case omits to mention a substantial part of the facts on which the District Court and the Court of Appeals for the Seventh Circuit concluded that the participation of the respondents should not be limited to the purchase price of their bonds.

Mollie Schroeder is the wife, and June Kuptz and Robert W. Schroeder are the adult children of William A. Schroeder, who was a large stockholder and a second mortgage bondholder of Franklin Building Company. (R. 82, 83) William A. Schroeder's investment in these securities has been completely wiped out (R. 115), but the first mortgage bondholders will receive their principal in full and a substantial amount of interest. The wife and daughter of William A. Schroeder never held any office in the corporation, were never members of the Bondholders' Committee, and never occupied any fiduciary relation toward the corporation or its bondholders. The same is true of the son Robert, except that he became a member of the Bondholders' Committee after the present reorganization proceeding was commenced (R. 52) and more than a year after he made his last purchase of first mortgage bonds. (R. 69, Exhibit O)

In September 1932 the condition of the Franklin Building Company was very precarious. The office building

which it had constructed on leased land was only partly finished, the real estate taxes were delinquent to the extent of $13,000, the corporation had no funds and its rents were garnisheed, and the gas and electric service were about to be cut off for nonpayment of bills. (R. 39, 153) At this juncture a first mortgage bondholders' committee was organized and the operation of the building was turned over to a trustee who was a member of that committee. (R. 24, 25) Thereupon William A. Schroeder, who was president of the corporation, ceased to have any connection with the management of the property, and the corporation itself became dormant though its corporate existence was not terminated and its officers remained nominally in office. (R. 110) During the next five years the delinquent tax bill increased to $42,000 (R. 39), but the Bondholders' Committee through its trustee operated the building and made sufficient payments on the back taxes to keep the City of Milwaukee from taking the property; but in 1937 the situation again became very acute, with the City threatening an immediate receivership (R. 87), and the Committee concluded to enlist the services of William A. Schroeder as rental agent of the property. (R. 87, 152) He accepted the appointment and continued in that capacity for the next ten years, until the present proceeding was instituted in 1947, and thereafter was retained as managing agent by the trustee in the reorganization proceeding. (R. 82) During the period of his management the net earnings of the building were continually devoted to the payment of taxes and the completion of the physical structure, until at the commencement of the present proceeding the enterprise was free of tax delinquency and had practically no current indebtedness, and had some $20,000 of cash in the bank. (R. 3) However, its $244,400 of first mortgage bonds and $50,000 of second mortgage bonds, together with acrued interest of about one hundred per cent

on each bond issue, amounted to nearly twice the value of the building (R. 3) and made a Chapter X reorganization inevitable. In the course of the reorganization, the building was sold by the trustee for $325,000 (R. 94), which will pay out the $185,300 of first mortgage bonds on which claims were filed (R. 133) at par plus about forty per cent interest. (Petition for certiorari, page 3)

The statement on pages 11 and 12 of the petitioner's brief that the debtor operated at a net loss every year from 1932 to 1947 is based on charging full bond interest, amortization of the 99-year lease, and depreciation of the building, as operating expenses before net profit or loss is determined. In actual fact, the operation of the debtor's property during the period of William A. Schroeder's management from 1937 to 1947 was highly successful in pulling the enterprise out of its immediate financial emergency, though it was clear from the outset that nothing was likely to be realized by the stockholders or the junior bondholders.

In November 1943, a group of individuals referred to in the record as the Ruppa-Dufenhorst group, who had acquired some of the first mortgage bonds, commenced an involuntary reorganization proceeding in the United States District Court, which was strenuously resisted by the Bondholders' Committee because it was not brought for the benefit of the bondholders but for the purpose of personal profit to the Ruppa-Dufenhorst group. (R. 87, 93) A sale of the building at that time would not have brought more than $75,000, or less than twenty-five cents on the dollar for the first mortgage bondholders after paying the taxes that were then still outstanding. (R. 94) Both William A. Schroeder and the members of the Bondholders' Committee were much disturbed by this Ruppa-Dufenhorst reorganization proceeding, as it seriously jeopardized their

program of nursing the enterprise back to a point where the first mortgage bondholders might be paid out in full. Accordingly they adopted a policy of trying to prevent any more of the first mortgage bonds from falling into unfriendly hands, first by strongly advising all bondholders with whom they came in contact to hold on to their bonds, and second by purchasing with their own individual funds the occasional bonds which would turn up in the hands of brokers for sale. (R. 37, 45, 107, 108)

In the case of the Schroeder family, the first purchases of bonds after the commencement of the Ruppa-Dufenhorst reorganization proceeding were made by Robert W. Schroeder, who was serving in the Navy after July 1, 1943, but who had left about $1,000 with his father for investment as his agent and kept remitting further funds to his father for the same purpose out of his Navy pay. (R. 53, 55) After his discharge from the Navy in December 1945 (R. 53), Robert returned to Milwaukee and entered upon the practice of law in his father's office (R. 63), and the two of them in February 1946 negotiated a purchase of the Ruppa-Dufenhorst bonds by Robert Schroeder at sixty cents on the dollar (R. 52, 56-57, 97), thereby putting an end to the threat caused by the reorganization proceeding that was still pending. Robert's last bond purchases were made in April and May 1946 from a broker. (R. 69, 71) All of his other purchases were made during the period of the Ruppa-Dufenhorst threat, except $1,100 par value which he bought at 9 cents on the dollar in 1942 from the state banking commission, which was liquidating a state bank. Robert was then a college student, working part-time in a factory. (R. 57, 70)

June Kuptz made her first purchase of bonds in May 1946 from a broker (R. 97), and she made further pur-

chases from him in March, April and June 1947. (R. 95-98) Her father acted as her agent in making all of her purchases, but the money was her own, which she had earned in government service during the war. (R. 99) She was married and living with her husband away from her father's home except for the period of her husband's military service and a short period after his return. (R. 100)

Mollie Schroeder's purchases of bonds were made in part through William A. Schroeder as her agent, and in part through Robert W. Schroeder as her agent, but with funds belonging solely to her. (R. 103) She was a school teacher for years before her marriage and had saved up some money, and when her husband "went broke" she again went to work. (R. 111)

ARGUMENT.

I.

This Case Does Not Involve a New Question of Federal Law But Merely a Few Unimportant Variations From the Situation in Which This Court Settled the Law Less Than Six Months Ago in Manufacturers' Trust Co. vs. Becker, 338 U. S. 304.

The effort of the petitioner to induce this Court to grant a writ of certiorari is grounded in part upon the claim that the present case involves new questions of law whose determination is of great importance in the administration of the arrangement and corporate reorganization provisions of the Bankruptcy Act. It is true, as counsel for the petitioner points out, that the question whether the members of the family of a fiduciary are sub-

ject to limitation of their claims merely by virtue of their relationship to the fiduciary is a question which has not been passed upon by this Court but was expressly left open in *Manufacturers' Trust Co. vs. Becker,* 338 U. S. 304, Footnote 16, 94 L. Ed. 99, 105, 70 Sup. Ct. 127, 133 (decided November 21, 1949). But the very reason for leaving the question open in the *Becker* case is equally present in the case at bar, namely, that under the evidence in the case, the conduct of the fiduciary himself was free from any taint of fraud or overreaching. Hence the present petition represents merely an effort to get the Court to go over once more the ground so recently covered in the *Becker* case upon a very similar state of facts.

This Court in the *Becker* case had before it findings of a referee which were an almost complete parallel to the facts on which Judge Duffy in the District Court and Judges Finnegan and Lindley in the Court of Appeals based their decision, in the case at bar, that the participation of the respondents should not be limited to their cost. The findings in the *Becker* case were summarized by this Court as follows (94 L. Ed. at page 103, 70 Sup. Ct. at page 130):

> "It was the referee's finding, left undisturbed by both courts below, that respondents' purchases were without overreaching or failure to disclose any material fact to the selling bondholders. Petitioner does not here contend that respondents' claims should be limited because of conduct by the Becker directors or by respondents amounting to bad faith or abuse of fiduciary advantage. Nor does petitioner contend that respondents' bondholders influenced the conduct of corporate affairs to the injury of the corporation or other creditors. Indeed, the referee

found that the purchases were not unfair to debtor, that at the time of respondents' purchases debtor was not in the field to settle its indebtedness on the debentures, and that the assistance rendered to debtor by respondents materially aided in its grave financial situation. Moreover, the findings indicate that the most generous suggestion of an offer for the apartment building after the Beckers became directors and prior to the sale was at a figure substantially less than the sale price."

With respect to these findings the Court, by Mr. Justice Clark, said (94 L. Ed. at pages 104, 105, 70 Sup. Ct. at pages 131, 132):

"When the transactions underlying respondents' claims here are drawn alongside a good faith standard of fiduciary obligation, they appear unobjectionable. There is no component of unfair dealing or bad faith. The findings negative any misrepresentation or deception, any utilization of inside knowledge or strategic position, or any rivalry with the corporation. During the period of the purchases the conduct of the Becker directors and of respondents with reference to the affairs of the debtor was to its substantial benefit and to the advantage of the other debenture holders. And there is nothing to suggest that had the debentures been acquired by the Becker directors, they would have been unjustly enriched. Cf. Securities and Exchange Commission vs. Chenery Corporation, supra, 318 U. S. at page 86, 63 S. Ct. at page 458, 87 L. Ed. 626. • • •

"Certainly the present record does not tend to establish that the opportunity for such purchases

during insolvency would deprive a going corporation of the sound judgment of its officer. *And in any event the potentiality of conflict must be weighed against the desirability of permitting reinforcement of the insolvent's position insofar as a director's acquisition of claims may help. On this record the probability that an actual conflict of loyalties arose from the opportunity to purchase respondents' claims, while the debtor was a going concern, is not great enough to justify the exercise of equity jurisdiction which petitioner urges.''*

Thus it is clear that the Court in the *Becker* case, upon an examination of the record, concluded that what had occurred in that particular case had had no wrongful results for which even the fiduciary himself, much less the mere relatives of the fiduciary, should be penalized. *Exactly the same situation exists in the present case.* Both the District Court and the Court of Appeals gave the case their careful scrutiny in an effort to ascertain whether any wrong had been done. Judge Duffy in the District Court examined into the "good faith situation now before the Court'' and concluded that the facts which we have detailed in our statement of the case justified the purchases of bonds by members of the Schroeder family as acts beneficial to the corporation and untainted by any violation of fiduciary obligation—assuming that such an obligation could exist at all on their part as mere relatives of a fiduciary. (R. 179; *Re Franklin Building Company,* 83 Fed. Supp. 263, 267) The Court of Appeals again examined the factual situation and the majority of the Court substantially repeated Judge Duffy's language in holding that there was no impropriety in the acts of Mrs. Schroeder or her children. (R. 207-208; *Re Franklin Building Co.,*

178 Fed. (2d) 805, 808) Judge Kerner, dissenting in the Court of Appeals, indicated no disagreement with the majority as to the propriety of the motives with which the purchases were made, but felt that the evidence indicated that bond purchases of the Schroeder family were a joint family enterprise directed by the fiduciary William A. Schroeder himself, hence he concluded that the members of the family were subject to the same strict rule which he assumed to be applicable to the actual fiduciary. (R. 208-209; 178 F. (2d) at p. 809) Neither the majority nor the minority of the Court of Appeals cited the *Becker* case, which had been decided by this Court just seventeen days before the decision of the Court of Appeals was filed.

Mr. Justice Clark, speaking for the Court in the *Becker* case, made it clear that the status of the corporation as a going concern is a matter of much importance in the consideration of fiduciary duties. Tested by the standard applied in the *Becker* case, the corporation here involved was emphatically a going concern throughout the period from 1941 to 1947 when the bond purchases in question were being made. True, the property was being operated by a bondholders' committee rather than by the officers and directors of the corporation, but it was a highly successful operation from the moment William A. Schroeder was called back into the management in 1937 after five years of floundering. (R. 152) He was able, *out of current earnings alone,* to pay not only the operating expenses as they accrued, but to pay up $42,000 of back taxes and devote nearly $100,000 to the completion of the building itself. (R. 39) The mere fact that interest was in default on the first and second mortgage bonds does not, of course, mean that the enterprise was not a going concern, any more than in the *Becker* case, where the interest

on the debentures was likewise in default. The very fact that the present reorganization will result in paying the first mortgage bondholders at least 140 per cent of their investment (Petition for Certiorari, page 3), as against the 43.61 per cent that was paid to the security holders in the *Becker* case (94 L. Ed. 101, 70 Sup. Ct. 129), is in itself an impressive tribute to the singleness of purpose with which William A. Schroeder managed the enterprise from the time he was brought back into the management in 1937 until the building was sold in 1947. His own investment, consisting of stock and second mortgage bonds, was a total loss, and in addition he accepted without complaint the decision of the District Court that his own purchases of $4,500 of first mortgage bonds—made with the same unselfish motive as those of his wife and children—should be repaid at his actual cost only; but he devoted ten years of his life to getting the property free from tax encumbrances, physically completed, and on a net earning basis of $25,000 per year (R. 87), for the sole benefit of the first mortgage bondholders other than himself. If Judge Duffy had had the benefit of the decision of this court in the *Becker* case—which had not yet been decided even in the Court of Appeals at the time he decided the case at bar—he no doubt would have allowed in full the claim of William A. Schroeder as well as the claims of his wife and children. This is mentioned lest it be inferred that because of William A. Schroeder's failure to appeal from the decision on his own claim, the members of his family may stand in a less favorable position than the relatives of the fiduciaries involved in the *Becker* case.

An attempt may be made to distinguish the *Becker* case from the case at bar by reason of the pendency of an involuntary petition for reorganization of the present debt-

or corporation during the period that the respondents were purchasing their bonds, thus bringing the present case (it might be argued) within the rule mentioned by Mr. Justice Clark as prevailing in the lower federal courts, that a fiduciary may not purchase securities of the debtor corporation "after judicial proceedings for the relief of a debtor are expected or have been begun." But the involuntary reorganization proceeding commenced in 1943 and dismissed in 1947 was, as Judge Duffy pointed out in his decision in the District Court, a part of the very program of wrecking the debtor corporation which was attempted by the socalled Ruppa-Dufenhorst group and was frustrated by the vigilance of the Schroeder family and a few others in preventing that group from acquiring additional bonds. Judge Duffy stated in his decision, referring to the 1943 proceeding:

> "There is much to indicate this proceeding was not a good-faith attempt to reorganize the debtor. The court refused to permit the management of the premises by the Bondholders' Committee to be disturbed. Due to that consideration and also because of the necessity of determining the ground rent for the ensuing years, the status quo was maintained and the proceeding was dismissed in 1947, at which time the bonds held by Ruppa and his associates were purchased." (R. pp. 179-180; 83 Fed. Supp. at p. 268)

The purchaser of these Ruppa bonds was Robert W. Schroeder, one of the present respondents, and his purchase relieved all of the first mortgage bondholders of the threat which had hung over them since 1943, that the property might be disposed of in a manner quite contrary to the interests of the bondholders.

It may be further argued that the decision in the *Becker* case loses some of its force here in view of the fact that the present case involves a Chapter X reorganization and therefore may be differentiated from the *Becker* case in view of the language in the closing paragraph of Mr. Justice Clark's opinion to the effect that in a Chapter X proceeding, "the Securities and Exchange Commission, acting as the statutory advisor to the court, would have been within its rightful function in submitting to the court the light of its experience on dealings of the general kind disclosed in this case. Here we have proven facts in a particular case, and not a body of evidence submitted by the Securities and Exchange Commission, presumably informed by expert understanding." The Securities and Exchange Commission did participate in the case at bar at all stages, but it presented no such body of evidence as Mr. Justice Clark referred to in the language just quoted. It produced no evidence at all. Its counsel attempted to have the factual circumstances surrounding the purchases of bonds by the Schroeder family excluded from the record entirely, and the following colloquy ensued between the court and the attorney for the Commission (R. 157):

> "Mr. Powers: I am going to raise the further objection, or the objection again, that the line of questioning or interrogatories is entirely irrelevant to the issues before this court.
>
> "The Court: I don't think you are right on that. Unfortunately, you must know, as the court knows, there are certain dynamiters that go around and buy up bonds and then try to hold up the concerns by threatening legal actions, and so forth. It is well known to this court because we have had trails of these fellows pass by here close on numerous occa-

sions. Now, I presume what they want to show, in view of the testimony they took before, was they didn't want some of these bonds to get in the hands of some of these fellows and in good faith bought them up. Now, can't they show that? Isn't that relevant?

"Mr. Powers: No, I think not, your honor.

"The Court: Well, I am going to permit it anyway."

Thus the issue was sharply drawn in the trial court, upon the objection of the Securities and Exchange Commission itself, as to whether the question at issue was to be decided by a rule of thumb without paying any attention to the surrounding circumstances in the particular case; and the subsequent decision of this court in the *Becker* case squarely upholds the action of the District Court in admitting and considering the evidence on that subject. If the Securities and Exchange Commission had any "body of evidence" available for submission as suggested by Mr. Justice Clark in the final paragraph of the opinion in the *Becker* case, the Commission refrained from giving the trial court the benefit thereof.

It is somewhat ironical to note that if Robert W. Schroeder had not purchased the Ruppa bonds, and they had continued in the ownership of the Ruppa group to the present time, the so-called profit which the trustee is so anxious to prevent Mr. Schroeder from receiving would have gone to the Ruppa group, whose purpose in acquiring the bonds was destructive while the purpose of Schroeder was constructive and beneficial to the interests of the bondholders as a whole. Not only that, the Ruppa group would have made a much greater profit than Robert W.

Schroeder can ever make, because Schroeder had to pay 60 cents on the dollar for these bonds which the Ruppa group had bought at a time when the prospects of the enterprise were so gloomy that the cost to the group must have been exceedingly low. The net result is, that if Schroeder were to be penalized for purchasing the bonds at a time when his father was a member of the Bondholders' Committee, his fellow bondholders would now receive the amount of that penalty as a pure windfall, toward which they made no contribution whatever, whereas if Schroeder had refrained from purchasing the bonds, the long-term bondholders would have missed the windfall completely and the profit would have accrued to the group whose motive, as described by Judge Duffy, was to "dynamite" the enterprise.

It is respectfully submitted that the granting of the petition for certiorari in the present case would not open the way for a determination of any question of law that would be helpful in the administration of Chapter X of the Bankruptcy Act, but would merely involve this court in the examination of a record to determine whether the Court might agree or disagree with the factual conclusions reached by both the District Court and the Court of Appeals upon that record.

II.

The Alleged Conflict Between the Seventh Circuit and the Second, Third, and Sixth Circuits Does Not Exist.

A second ground on which the petitioner seeks to have the writ of certiorari issued is that the decision below

is said to raise a conflict between the Seventh Circuit on the one hand and the Second, Third and Sixth Circuits on the other.

In actual fact no such conflict exists. The Second Circuit has held, in a case not involving a corporate reorganization, that where directors of a corporation purchase for themselves certain stock which has been offered to the corporation and is needed in its business, and large profits are subsequently made upon the stock, not only the directors themselves but the agent whom they employed to procure the offer of the stock and who joined with them in making the improper purchase, are liable to the corporation for the profits realized. *Irving Trust Co. vs. Deutsch*, 73 Fed. (2d) 121 (C. C. A. (2d) 1934. The principle of law followed in that case as to the agent who joined with the directors was that "one who knowingly joins a fiduciary in an enterprise where the personal interest of the latter is or may be antagonistic to his trust, becomes jointly and severally liable with him for the profits of the enterprise." 73 Fed. (2d) at p. 125.

To say that the Seventh Circuit in deciding the case at bar was denying the principle of law just quoted is to disregard the whole factual setting of the present case. The petitioner's assumption is that the respondents were engaged with William A. Schroeder in a joint enterprise and that they knowingly joined with him, a fiduciary, in breaches of his trust. That assumption begs the whole question. The very thing that the courts below had to decide was whether the purchases of bonds by the respondents constituted a violation of the duty of a fiduciary. It is true that William A. Schroeder acted as the agent of the respondents in the purchase of a portion of their bonds, but the petitioner cites no authority for the assertion that a fiduciary who is denied the opportunity

to make a profit for himself in purchasing bonds of the debtor, is likewise barred from acting as an agent for others in the purchase of such bonds with their money and for their benefit. The recent decision of this court in *Manufacturers' Trust Co. vs. Becker*, 338 U. S. 304, is a square holding to the contrary, for in that case the court stated that the debentures of the relatives were purchased "through the agency of the Becker brothers [the fiduciaries] and in the latter's judgment" (94 L. Ed. at p. 102, 70 S. Ct. at p. 130); yet that fact did not weigh against the allowance of the claims of these relatives in full.

Petitioner's argument under this heading appears to be that, conceding that the respondents never occupied a fiduciary position and thus were under no inhibition against buying bonds of the debtor if they had gone directly to the brokers, their purchases were made wrongful by the fact that the brokers offered the bonds to William A. Schroeder and he accepted the offers as the agent of his wife and children. Much is said in the brief about the use of "inside information", and every effort is made to give the transactions a sinister appearance. But the fact remains that the testimony shows without dispute that the calls from the brokers came to the office of the building company because that was the place where the brokers would naturally apply first when seeking a customer (R. 92, 108); that after the commencement of the 1943 reorganization proceeding which threatened to wreck the whole program of rehabilitation, William A. Schroeder encouraged the brokers to apply first at the office of the building in order to keep the bonds out of unfriendly hands (R. 108); and that his motive in so doing was the protection of the first mortgage bondholders against "rocking the boat" at a time when it might have been disastrous. (R. 92) Conduct so motivated calls for commen-

dation, not punishment. Such, in fact, is the substantive law of Wisconsin, the respondents' home state. *McGeoch Building Co. vs. Dick & Reuteman Co.*, 253 Wis. 166 (1948). In the cited case the Wisconsin Supreme Court said at page 177:

> "In the instant case the trustee bought the bonds with the knowledge of the mortgagor, did not solicit them from among bondholders and bought them under circumstances that benefited both the bondholders and the mortgagor. The bondholders were protected by the maintenance of a market for the bonds. The mortgagor was protected by having the bonds in friendly hands. No harm is shown to have resulted. The trustee has not been guilty of any breach of contract, and no reason exists in the broader field of equity for finding any breach of fiduciary duty necessitating appellants' giving to respondent the earnings made by appellants by buying the bonds they did."

Counsel for the petitioner (Brief, pp. 2, 23, 31) repeatedly characterizes the bond purchases of the appellees as "a family enterprise" or "a joint enterprise"; but such an appellation is justified only if based upon evidence, and the evidence in the present case is all the other way. It is established without contradiction that the appellees all had separate estates of their own, derived from their own earnings. They used these separate estates in purchasing the bonds. June Kuptz is married and lives with her husband, away from the William A. Schroeder home, though she returned to her father's home for a time while her husband was in military service. (R. 100) Robert W. Schroeder is married and lives with his wife at the home of her parents (p. 77), and is an assistant district

attorney of Milwaukee County and national adjutant of one veterans' organization and state commander of another. (R. 64, 78) Mollie Schroeder, although of course a member of her husband's household, has always had assets of her own dating from a period prior to her marriage. (R. 117) These people are all individuals in their own right, with their own separate interests, resources and investments. They invested in the bonds of the debtor corporation their own hard-earned money, not any funds received directly or indirectly from the fiduciary William A. Schroeder.

The circumstances of the case at bar are so completely different from those involved in the Second Circuit case, *Irving Trust Co. vs. Deutsch,* 73 Fed. (2d) 121, that there never was any occasion in the present case for the Court to consider the rule of law which governed the Second Circuit case. There is no reason to believe that the Seventh Circuit would fail to follow that rule of law in a case properly involving its application. Paragraph 5(b) of Rule 38 of this Court provides for the granting of certiorari where the court below "has rendered a decision in conflict with a decision of another circuit court of appeals *on the same matter.*" Under that rule, the Second Circuit decision furnishes no basis whatever for granting certiorari in the present case.

The same is equally true of the decision cited by the petitioner from the Sixth Circuit, *Re Van Sweringen Co.,* 119 Fed. (2d) 231 (1941) In that case the District Court found "that Midamerica Corporation was a combination in corporate form, participated in by directors of the respective debtor corporations, formed and utilized for the purpose, among other things, of divesting the debtor corporations of their properties or of obtaining claims against

them at a sacrifice for the profit of the combination at the expense and to the detriment of the debtor corporations." 119 Fed. (2d) at page 232. The Court held that two non-directors who joined with the directors of the debtor corporation in purchasing claims against it at a discount for the joint benefit of all of the conspirators, were properly held to their actual cost in the distribution of the debtor's assets, the same as the directors themselves. As the Court said, "it is apparent here that the cupidity of persons in a fiduciary position has caused them to serve themselves in preference to those whom it was their duty to serve. Such dereliction is forbidden by just principles of law." 119 F. (2d) at page 235. To say that the Court of Appeals of the Seventh Circuit in the case at bar has repudiated the principle followed in the *Van Sweringen* case is simply to misread the decision of the court below and disregard the facts of the present case. There is no conflict whatever between the Seventh Circuit and the Sixth Circuit.

The third decision on which petitioner relies as establishing a conflict between circuits is that of the Third Circuit Court of Appeals in *Re Midland United Co.*, 159 Fed. (2d) 340 (1947). That case arose under the *mandatory* section 249 of the Bankruptcy Act (11 U. S. Code 649), which provides that *no compensation shall be allowed* to any committee or attorney or other fiduciary who, during the continuance of that capacity, has purchased claims or stock without the approval of the court. The District Court in Delaware had held this statute applicable to purchases made by the wife of an attorney in the reorganization proceeding. The Circuit Court of Appeals affirmed, Judge Goodrich dissenting with the remark that "nobody would, these days, fall back on the old common law unity of husband and wife now that a married woman may keep her own money, if she is lucky enough to have any,

and trade with it as she pleases." What the court was dealing with in the *Midland United* case was a statute relating to *compensation* for services rendered in the reorganization, which is a matter of Congressional grace rather than of right, whereas in the present case the petitioner is seeking *to deprive the respondents of a property interest which they have bought and paid for with their own money.* Anyone undertaking to work for a reorganization committee, either as a member or as an attorney, acquires only such right to compensation out of the fund in the hands of the court as the governing statute gives him. The question whether that statute shall be limited to its exact language or broadened by judicial interpretation is far different from the question whether individuals who have entered upon no fiduciary relationship shall be treated as fiduciaries against their will. In the *Midland United* case the dealings of the wife in securities of the debtor resulted in depriving the *fiduciary* of compensation, but no attempt was there made, as in the present case, to take away property owned by member of his family.

The statute under which the District Court was asked to limit the respondents' participation in the present case is very different from Sec. 249. It is Sec. 212 of the Bankruptcy Act (11 U. S. Code 612), which provides that the judge "may limit any claim or stock acquired by such person or committee in contemplation of or in the course of the proceeding under this chapter to actual consideration paid therefor." The "person or committee" is designated earlier in the sentence as "an agent, attorney, indenture trustee or committee [which] purports to represent any creditor or stockholder." The language of Sec. 212 is purely permissive, while that of Sec. 249 is mandatory. The petitioner claims that because the Court of Ap-

peals of the Third Circuit held the *mandatory* statute to be applicable to members of a fiduciary's family, while the Court of Appeals of the Seventh Circuit upon the facts of this particular case has refused to enforce the *permissive* statute against members of a fiduciary's family, a conflict exists between the two circuits.

Obviously there is no conflict. The decision of the Court of Appeals in the case at bar takes no position whatever as to whether Sec. 212 *could* be applied to the members of a fiduciary's family. That subject is nowhere mentioned in the decision. The Court simply held that the case before it was not a proper one for so applying the statute, because of the facts which the court reviewed at length. The question left open in *Manufacturers' Trust Co. vs. Becker,* 338 U. S. 304, as to whether members of a fiduciary's family may properly be limited to their cost, was likewise left open in the decision of the Court of Appeals in the case at bar. That decision would have been no different if the Court of Appeals had definitely concluded and had stated in so many words that Sec. 212 does apply to members of a fiduciary's family. So applied it would still be a permissive and not a mandatory statute, and the Court would have reached the same conclusion upon the facts of the case as it actually did reach. There was simply no necessity of deciding what persons Sec. 212 covers, because the case was found to be one that did not call for the imposition of the statutory penalty in any event.

The petitioner in his Brief (pages 20-21) conjures up all manner of evils that may arise if the relatives of a fiduciary are permitted to make a profit on securities of the debtor which they purchase. Both the District Court and the Court of Appeals are well satisfied that no such evils did arise in this case, but that fact, petitioner says, is im-

material because what is needed is a deterrent. This is but another way of insisting that the court must apply a rigid rule of thumb in every case. Had Congress so intended, it would have used in Sec. 212 the kind of mandatory language it used in Sec. 249. Congress deliberately made the action of the court in situations falling within Sec. 212 discretionary; and if there be situations that do not fall within Sec. 212 but are allegedly governed by some parallel general principle of equity, certainly no one can plausibly argue that the court must adhere to a rigid rule and *disregard* all equities. The ability of the trustee to close this reorganization with a feather in his cap, with every first mortgage bondholder paid his principal in full and some 40 per cent interest, is in no small part due to the vigilance of the Schroeder family in drying up the market for bonds which might otherwise have fallen into the hands of persons bent on tearing down the enterprise rather than building it up. The wife and children of William A. Schroeder were the only ones who had the resources to "hold the fort" in this manner during the critical days of the rehabilitation program; Schroeder himself had lost his entire investment in the enterprise as a stockholder and second mortgage bondholder, and was "broke" (R. 86), and was not able to assist in the effort until late in 1946 when he began to get back on his feet. (R. 112) He accepted with good grace the District Court's decision that his own purchases must be limited to his cost; yet the trustee insists that the courts should break new ground and inflict upon Schroeder's wife and children an unprecedented punishment for doing things that not only caused no injury to the first mortgage bondholders or anyone else, but helped to save the situation so that the trustee could carry to completion an entirely successful and creditable reorganization.

CONCLUSION.

It is respectfully submitted that the petitioner has made no case for the granting of a writ of certiorari, and that his petition should be denied.

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